Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 153

ROBERT A. CHESEBROUGH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR ON QUESTION OF PROTEST AND VOLUNTARY PAYMENT.

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ROBERT A. CHESEBROUGH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

Reply Brief for Plaintiffs in Error on Question of Protest and Voluntary Payment.

In reply to the first point in the original brief and to the additional brief of the Attorney General on the questions of protest and voluntary payment, we respectfully submit the following points:

I. As the case was decided below on demurrer to the petition, all facts and inferences of fact relevant to the allegations of the petition will be deemed established in favor of claimant.

II. The facts set out in the petition show an involuntary payment of the tax sought to be recovered.

III. By statute and under the regulations of the Treasury Department protest is not required to be made *at the time of paying the tax.* In lieu of protest an application must be made to the Commissioner for a refund at any time within

two years from the date of payment. This is the statutory equivalent of a common-law protest or notice of suit. The claimant has fully complied with the statute and regulations.

FIRST. *As the case was decided below on demurrer to the petition, all facts and inferences of fact relevant to the allegations of the petition will be deemed established in favor of claimant.*

This is an elementary rule of pleading applicable as well to suits against the Government under the Tucker act as to actions in the ordinary courts of law.

It is set out in the petition (R., 4, 5) that the act provided a heavy fine for failure to affix the stamps, and that unstamped documents should not be received in evidence, and that claimant "under compulsion of said law," *i. e.*, to avoid the risk of fine and of a trial in the criminal courts for a misdemeanor and "in order to entitle such deed to be recorded * * * and to be received as evidence in the Federal courts * * * and in order * * * to fulfil his contract * * * to make * * * a good and sufficient deed * * * and in order to give a good and clear title to said real estate free from doubt did purchase from Charles H. Treat the U. S. collector of internal revenue * * * and place on said deed stamps to the amount of $600."

Under these very general allegations, all admitted by the demurrer, almost any facts showing an involuntary payment would be admissible in evidence, and claimant is entitled to the inference of fact that the payment was involuntary.

In view of these allegations in the petition, the absence of protest is *matter of defense to be raised by answer and not available on demurrer.*

SECOND. The facts set out in the petition show an involuntary payment of the tax sought to be recovered.

The general rule of law is that money voluntarily paid under a mistake of law cannot be recovered, but that an involuntary payment can be recovered where the party to whom it was made had not the right to receive it.

A "protest" is merely satisfactory evidence that the payment was involuntary, but where the parties are not on equal terms, where one compels the payment by threats or duress, the law presumes that the payment was not made at free will. This point is fully discussed in the case of *Swift Company vs. U. S.*, 111 U. S., 22, at pages 28–30.

THIRD. By statute and under the regulations of the Treasury Department protest is not required to be made at the time of paying the tax. In lieu of protest an application must be made to the Commissioner of Internal Revenue for a refund at any time within two years from the date of payment. This is the statutory equivalent of a common-law protest or notice of suit. The claimant has fully complied with the statute and regulations.

The learned Attorney General cites, at page 13 of his brief, section 31 of the act of July 1, 1862, which did, indeed, require a protest; but this act has been long since repealed, and in its place we have a complete statutory procedure for obtaining the refund of all internal-revenue taxes which "appear to be unjustly assessed * * * or in any manner wrongfully collected" (R. S., § 3220).

At page 14 of his brief the Attorney General argues that as the law was settled under the act of 1862, and under the decision of this court in *Philadelphia vs. Collector*, 5 Wall., 720, that a protest was necessary, the law is now the same, because the Revised Statutes do not provide that a protest is *not necessary*. We submit that the conclusion to be drawn is just the opposite. Section 3220 is taken almost *verbatim* from the act of July 13, 1866, 14 Stat., 98, 111, which is *in pari materia* with the act of 1862. As in the act of later date the requirement of protest is omitted, the intention of

Congress evidently was that it should be no longer required.

The provisions of the Revised Statutes for the refunding of internal-revenue taxes are remedial, and therefore entitled to a most liberal construction in favor of the tax-payer, particularly as the courts are deprived by section 3224 of all power to restrain their collection.

The late distinguished Judge Richardson, of the Court of Claims, said with reference to these provisions in *Savings Bank of Pittsburgh vs. U. S.*, 16 Ct. Cl., 335, at 348:

"We said in *Kaufman's case*, 11 C. Cl. R., 669, that 'It has ever been the general and liberal policy of the Government under such regulations as Congress has either itself seen fit to make or has required its officers to provide to remit and refund taxes and duties erroneously assessed or paid in excess of legal obligations in order that the burdens of taxation may not fall unjustly upon any of its citizens.'

"The Treasury Department has followed the same liberal policy in construing and administering the law through the Internal Revenue Bureau.

"It is a principle universally recognized and enforced in the courts of law that an action cannot be maintained for the recovery back of money paid in discharge of a tax illegally assessed unless the payment was made under protest. But that principle has as uniformly been held by the Commissioner of Internal Revenue * * * *as altogether too technical and too exacting* for application to the refund of taxes through the Commissioner and from the beginning *no proof of protest has been required.*"

Kaufman's case was affirmed (96 U. S., 570), and the Savings Bank's case (104 U. S., 728).

The provisions of law for securing the refund of internal-revenue taxes are nearly assimilated to those for customs duties. Under sections 3220 and 3226 application must first be made to the Commissioner before suit can be brought in any court, and this application must be within two years. Under the customs laws a "notice of protest" must be filed within ten days after, *and not before*, not the payment of duties,

but *the liquidation of the entry*. This so-called "notice of protest" is really an appeal from the collector to the board of appraisers, but in neither case is it required that there should be any protest or notice *at the time of payment of the duties*.

Whether this application is made five minutes or ten days or two years *after* the payment, it is not the protest required by common-law principles in order to maintain an action against the *collector*.

Elliott vs. Swartwout, 10 Pet., 137, 152.
Erskine vs. Van Arsdale, 15 Wall., 75, 77.

It would be an extraordinary judicial construction of sections 3220, 3226, 3227, and 3228 to hold that while the application to refund could be made to and granted by the Commissioner where no protest was made, yet where it was denied by him no action could be maintained.

As the Court of Claims said in the *Savings Bank case* (*supra*):

"It is a novel defense to set up in a court of justice that the officers of a defendant corporation or quasi corporation have decided not to pay the demand sued upon."

The intention of Congress not to require any protest is further shown by section 3426, which authorizes the Commissioner of Internal Revenue to make regulations—

"for the allowance of * * * stamps issued under * * * any internal-revenue act * * * which through mistake may have been improperly or unnecessarily used or *where the rates or duties represented thereby have been paid in error* * * * and such allowance shall be made either," etc., "or by repaying the amount or value."

Pursuant to this section, on October 26, 1899, the Commissioner promulgated a regulation (Compilation Decisions Comm'r Int. Rev., vol. 2, # 21706), which provides in part:

"In cases where stamps have been affixed to instruments not requiring them and canceled * * * the amounts

paid in error or excess may be refunded upon claims made on form 46 accompanied by the stamps, and, where practicable, by the instruments to which the stamps have been erroneously attached, or copies thereof."

It is alleged in the petition that the statutory and departmental regulations were fully complied with (¶ V, R., p. 5).

The action was properly brought under the Tucker act.

Dooley vs. U. S., 182 U. S., 222.

All of which is respectfully submitted.

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